

Mullins, Donna

From: Henson, Tucker
Sent: Wednesday, July 23, 2014 3:13 PM
To: Murdock, Russell; Parrish, Sharon; Mullins, Donna
Cc: McDonald, Scott; Nethery, William R MVN
Subject: RE: Paco Swain Realty, L.L.C., Dkt No. CWA-06-2012-2712

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My read:

We won on liability, but are going forward on penalty. The denial of accelerated judgment on penalty is based upon Swain's asserted inability to pay, which created an issue of fact sufficient to go forward to the hearing. There may be a possibility for a challenge to the penalty ruling through an interlocutory appeal since the ALJ used documentation submitted by Swain *after* the deadline for the motions and replies (and far after the Prehearing Exchange), but my gut says that isn't a great strategy, as the best we could hope for would be the EAB ordering the ALJ to assess a penalty, but not necessarily our proposed penalty.

The good part about this decision is (1) it does not appear that we will need to engage SAIC to testify, since the violations and liability is established, and (2) if I recall correctly, *Parkland* opens the door to considering the statutory factors independent of the penalty policy, so any testimony can be based on a more flexible set of criteria. The bad news is that someone needs to determine Mr. Swain's ability to pay, and the judge does not necessarily say whether the ALJ's office or the EPA should take on that duty.

Also, the ALJ seemed to rely a lot on Bill's expertise, which bodes well for Megan's Way, in which Bill did the JD; however, I would not expect a penalty ruling there either since the inability to pay assertions defeats the judgment on liability.

And FYI, please keep me involved in any ongoing activities in the case, since I'm not entirely sure how long my detail will last due to a recent Supreme Court case that TCEQ and EPA are still digesting.

Good job, y'all.

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From: Murdock, Russell
Sent: Wednesday, July 23, 2014 2:12 PM
To: Parrish, Sharon; Mullins, Donna
Cc: Henson, Tucker
Subject: FW: Paco Swain Realty, L.L.C., Dkt No. CWA-06-2012-2712

Motion for Accelerated Decision granted with respect to liability, but denied with respect to penalty.

Status Report on any settlement efforts due on/before 8/29/2014.

I have not had a chance to review thoroughly, but wanted to pass along now.

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From: Whiting-Beale, Maria
Sent: Wednesday, July 23, 2014 1:52 PM
To: Murdock, Russell; morganlaw@bellsouth.net
Subject: Paco Swain Realty, L.L.C., Dkt No. CWA-06-2012-2712

Order On Complainant's Motion For Accelerated Decision.